view, consonant with the plain language of the Code, does not represent the intention of the Legislature, it would appear an easy task to achieve the appropriate amendment.

I decide the preliminary objection in favour of the plaintiff.

I also give leave to the plaintiff and defendants to amend their pleadings if they so desire: the amended plaint is to be filed within 3 weeks from the date when this judgment is read, and the amended defence within 3 weeks from the date when the amended plaint is filed.

Objection over-ruled.

[ORIGINAL CIVIL JURISDICTION]
MILLS, J.
March 25, 1939.

S. K. WONG & ORS. v. THE OVERSEA CHINESE THEATRES LTD.

[JOHORE BAHRU CIVIL SUIT No. 28 of 1938]

Landlord and Tenant—Tenant holding over after expiration of lease.

If a Lessee holds over after the expiration of his lease he is liable to pay damages for the use and occupation of the premises. In considering the value of the use and occupation, the nett annual value must be assessed on the principle that he who holds the premises without an express bargain agrees to pay whatever the jury may find the occupation to be worth. Mesne profits are defined in s. 2 of the F.M.S. Civil Procedure Code to include profits which a person in wrongful possession might with ordinary diligence have received from the property.

FURTHER CONSIDERATION OF ACTION.

John Laycock for plaintiffs.

M. C. Johannes and *M. Ismail* for defendants.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

MILLS, J.—In this suit the plaintiffs claimed possession of certain land and premises, also double rent for holding over from 1st October, 1938, until delivery of possession or judgment.

On 15th February, 1939, I ordered the defendants to deliver possession on or before 15th March, 1939, and I reserved the question of double rent for further consideration. On the 22nd March, 1939, the plaintiffs obtained leave to amend their plaint by deleting the claim for double rent and substituting a claim "for damages for use and occupation and for holding over possession of the said and premises at the rate of $610 per month from the 1st day of October, 1938 until delivery of possession".

The hearing of the claim for damages took place on the 22nd March, 1939, and I was asked to put my decision in writing. I hold that the plaintiffs have the right to treat the defendants as tenants at sufferance for the period during which they hold after the expiration of the lease and to sue them for use and occupation in respect thereof. (*Leigh* v. *Dickenson*, 12 Q.B.D. at p.196).

I find that the lease expired on 30th September, 1938. In my opinion the plaintiffs were quite right to abandon their original claim for double rent: the law of Johore does not justify such a claim. It remains for the Court, sitting as a jury, to assess the damages for use and occupation.

The principle is laid down by Lord Denman C.J. in *The Mayor of Thetford* v. *C. D. Tyler* (115 English Reports, at p. 812)

> " But the case rests upon a principle resulting from the nature of an action for use and occupation, namely, that he who holds my premises without an express bargain agrees to pay what a jury may find the occupation to be worth. Where a party, having held for a term at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there be no evidence to the contrary, that the holds at the former rent. But in the present case there is so clear an indication of an intent to alter the terms that that principle cannot apply".

The defendants had a lease of the land and premises for one year from the 1st October, 1937, at a rent of $200 a month. On the 4th June, 1938, one of the plaintiffs wrote to the defendants stating that if they wished to negotiate for the renewal of the lease for another year, the rent would be $1,500 a month.

On the 8th June, 1938, the defendants replied making a counter-offer of a rent of $425 a month.

I therefore find as a fact that there was a clear indication of an intent to alter the terms of the former lease. On or about 29th June, the plaintiffs invited tenders for a six-year lease of the land and premises: the highest tenderer offered $610 a month: the defendants also offered $610 a month. At the hearing of the issue as to damages, the defendants submitted two alternatives to the Court:—

I. " In considering the value of the use and occupation the net annual value must be taken" (*Clerk and Lindsell* on Torts, 8th edition, p. 329).
They called evidence to show that the net annual value of the land and premises in the valuation roll of the Johore Bahru Town Board is $2,400 in 1938 and $5,400 in 1939.
It was not shown, however, that the Assessment Committee knew of the offer of $610 a month.
In any case, I should find that the more accurate valuation was that

obtained after calling for tenders; particularly as the defendants themselves offered $610 a month.

II. The defendants submitted that by reason of Section 30 of the Civil Procedure Code, the plaintiffs could not recover anything more than mesne profits, because no other claim can be joined with a claim for the recovery of immovable property without leave of the Court and no such leave was given.

The defendants tendered evidence to show that the profits of the business carried on by them on the land premises amounted to $600 during the period from October, 1938, to March, 1939.

But, as was rightly pointed out to me on behalf of the plaintiffs, those profits are the profits of the business, and not of the property claimed: "mesne profits" are defined in Section 2 of the Code to include profits which the person in wrongful possession might with ordinary diligence have received therefrom, and there is no reason why the defendants should not have obtained, as the plaintiffs did obtain, a rent of $610 for the land and premises."

That being so, it is not necessary for me to consider whether the claim falls within clause (b) of Section 30 of the Code (damages for breach of a contract under which the property was held), or whether the leave of the Court was given by implication.

I hold that damages are correctly based on an average rental of $610 a month for a period of 6 years. As I have no evidence as to the probability of the value increasing or decreasing during those 6 years, I must presume that the value remains constant at $610 a month.

I therefore assess the damages at the rate of $610 a month from the 1st October, 1938, until delivery of possession, and I order the defendants to pay such damages to the plaintiffs.

Judgment accordingly.

Solicitors for plaintiffs—*Braddell Bros.*

Solicitors for defendants—*M. Ismail.*

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

May 24, 1938.

THE STATE OF JOHORE.....Applicant

vs.

ESTATE & TRUST AGENCIES (1927) LTD., MALACCA, THE LEGAL PERSONAL REPRESENTATIVES OF LEE AH TIN AND 3 ORS.....Respondents

[JOHORE BAHRU LAND REFERENCE No. 1 of 1938]

Land Enactment—Powers of Commissioner on enquiry under Section 54—Small Estates Enactment, 1936—Hearsay evidence, whether admissible—Adverse possession.

On a reference made to the Court by the Commissioner of Lands & Mines under Section 22 of the Land Enactment, the following opinions were expressed as *obiter dicta, viz*: (1) The powers of the Commissioner under Section 54 to adjudicate on an agreement for sale are not affected by the Small Estates Enactment, 1936; (2) Hearsay evidence in proceedings before the Commissioner may be accepted only in the circumstances permitted by the Evidence Ordinance; (3) The Commissioner may take cognisance of an interest claimed by virtue of long possession for a period exceeding 12 years in order to extinguish the title of the registered owner and to give a title to the person in possession.

REFERENCE UNDER LAND ENACTMENT.

Abdul Hamid, Deputy Public Prosecutor for Applicant.

H. R. S. Zehnder for 1st Respondent.

F. R. N. Massey for 2nd Respondent.

MILLS, J.—In this proceeding the Commissioner of Lands refers for the direction of the Court three questions regarding the exercise of his powers when enquiring into an application under Section 54 of the Land Enactment. In order to save time, trouble and expense, I determined the application by virtue of Section 22, but the Commissioner desires me to state my opinions as to his questions for his future guidance.

These opinions are, of course, *obiter dicta*.

The first question is this.

"Whether his powers extend to adjudicating on an agreement for sale."

It is quite clear that before the passing of the Small Estates Enactment, 1936, the Collector had power under Section 42 to register a person as the owner of land (other than land held under grant or lease) where that person based his claim on an agreement for sale. It is also clear that the Commissioner had power, under Section 54, to register any interest in land, besides ownership, even when the land was held under grant or lease.

But the Small Estates Enactment, 1936, restricted the powers of the Collector by withdrawing from him the power to register a person as owner when that person claimed by succession to a deceased proprietor or by virtue of an agreement for sale.

That Enactment did not, however, expressly amend Section 54 of the Land Enactment: and its effect on that Section is open to some doubt.

The one view is that since Section 54 was not expressly amended, the powers of the Commissioner are not affected.

The other view may be expressed as follows:—